LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
DEC 5 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 605

WILLIAM GOULD, doing business as STAY-RITE SUPPLY CO., and KEYSTONE PLASTICS INC.,

Petitioners,

vs.

RICHARD A. FISCH and ANCHOR PLASTICS CO., INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GEORGE B. FINNEGAN, JR.
30 Broad Street
New York 4, New York
Attorney for Respondents

JEROME G. LEE (New York, New York)
Of Counsel

INDEX

	PAGE
This Is A Usual Patent Suit	1
Opinions Below	2
Question Presented	2
The Patented Invention Truly Promotes the Progress of Science and the Useful Arts	4
The Petition Presents No Valid Reason for Allowance of the Writ	6
a. No issue of evidentiary fact or credibility	7
b. The Court of Appeals accepted and relied upon the Trial Court's evidentiary findings and the expert testimony	8
Conclusion	11

AUTHORITIES CITED

Cases:

Atlantic v. James B. Berry, 106 F. 2d 644, 645 (3 Cir. 1937)	10
Benz v. Celeste, 136 F. 2d 845, 846-7 (2 Cir. 1943)	10
Graver Tank & Mfg. Co. v. Linde Air Products, 336 U. S. 271 (1949), 339 U. S. 605 (1950)	2, 6
Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp., 340 U. S. 147, 153 (1950)	6

PAGE

Hazeltine v. General Motors, 170 F. 2d 6, 10 (6 Cir. 1949) 10

Heald v. Rice, 104 U. S. 737, 749, 26 L. Ed. 910, 914 (1882) 10

Helis v. Ward, 308 U. S. 365, 370 (1940) 3

Himmel v. Serrick, 122 F. 2d 740, 742-3 (7 Cir. 1941) 10

Merchants' Nat. Bank v. City of Richmond, 256 U. S. 635, 638 (1921) 10

Munro v. Smith, 259 Fed. 1, 2 (1 Cir. 1919) 10

National Licorice v. NLRB, 309 U. S. 350, 357 (1940) 3

Sales Affiliates v. National Mineral Co., 172 F. 2d 608, 613 (7 Cir. 1949) 10

Statutes and Rules:

Federal Rules of Civil Procedure, Rule 52, 28 U. S. C. A 2

Revised Rules of the Supreme Court of the United States, Rule 23(1)(c), 28 U. S. C. A., as amended 1956 3

Miscellaneous:

Webster's New International Dictionary, 2nd Edition, 1945 4

Abbreviations Used in This Brief

We follow the same abbreviations used in the petition for certiorari:

Abbreviation	*For*
Pet.	—Petition for certiorari
Pet. App. B	—Court of Appeals Opinion
Pet. App. C	—District Court Opinion
P.—a	—Appendix to Brief for Plaintiffs-Appellants in the Court of Appeals
D.—a	—Appendix to Brief for Defendants-Appellees in the Court of Appeals

IN THE

Supreme Court of the United States

October Term, 1957

No. 605

WILLIAM GOULD, doing business as STAY-RITE SUPPLY CO., and KEYSTONE PLASTICS INC.,

Petitioners,

vs.

RICHARD A. FISCH and ANCHOR PLASTICS CO., INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

This is a usual patent suit.

The Petition raises no question of significance to anyone other than the litigants.

There is no conflict between the decisions of any courts of appeal. There is no federal question which has been decided in conflict with any decision of this Court. And

there has been no departure from the accepted and usual course of judicial proceedings.

This is the ordinary, straightforward, garden variety of patent suit in which the defendants-petitioners fully admitted infringement by stipulation, in which the District Court and the Court of Appeals agreed and concurred on the dispositive evidentiary facts, and in which the Court of Appeals unanimously held the patent valid, reversing the conclusion of non-invention by the District Court.

The suit was rightly decided and there is no sound reason why this Court should grant the writ.

Opinions Below

The opinion of the District Court was reported at 141 F. Supp. 2. The unanimous opinion of the Court of Appeals was reported at 246 F. 2nd 5. The opinions are printed herein as Appendices B and C at pages 14-30 of the Petition.

Question Presented

a.

The "question presented" by the Petition for certiorari (page 2) asks whether the Court of Appeals violated the "clearly erroneous" rule, Rule 52(a), discussed in *Graver Tank & Mfg. Co.* v. *Linde Air Products*, 336 U. S. 271.

The purpose and proper application of the "clearly erroneous" rule has been well settled by many recent decisions of this Court.* Since the Court of Appeals' opinion

* See the annotations in Fed. Rules of Civil Procedure, Rule 52, 28 U. S. C. A.

below neither discusses Rule 52(a) nor *Graver*, the question of whether the decision in this particular case adheres in detail to Rule 52(a) is a matter of importance to no one but the litigants and does not justify exercise of certiorari jurisdiction.

b.

Moreover, the "question presented" in the Petition simply asks whether the "clearly erroneous" rule was violated with respect to the *process* of the patent in suit.

But all of the seven claims of the patent were held valid by the Court of Appeals. Claims 4, 5, 6 and 7 cover an *article of manufacture;* and only the other three claims cover the process for making the article (P. 222-223a).

Thus, the writ, if granted, would bring only the process claims before this Court.*

Since defendants stipulated that their commercial product infringes article claim 7 (P. 5a, 113a), this Court's review of the process claims would not affect the outcome of these proceedings. Thus grant of the writ on the question presented in the Petition would be a useless exercise of judicial administration not even of value to the litigants.

* *National Licorice* v. *NLRB*, 309 U. S. 350, 357 (1940); *Helvering* v. *Ward*, 308 U. S. 365, 370 (1940); Rule 23 (1)(c), Revised Rules of the Supreme Court of the United States, 28 U. S. C. A., as amended 1956. "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

The patented invention truly promotes the progress of science and the useful arts.

Petitioners' statement of the case is incomplete and truncated. It distorts the nature of the invention and obscures the holdings below.

As summarized by the District Judge and affirmed unanimously by the Court of Appeals, the Seckel invention of the patent in suit comprises an article made by mixing and melting two or more incompatible thermoplastic fiber-forming linear-polymeric compositions, introducing them into an extruding machine, and extruding them into linear strips. The two plastic ingredients given in the patent example are cellulose acetate and cellulose acetate butyrate.* The resulting product is *fibrillar, i.e.* internally fibrous, and consists essentially of tiny, invisible longitudinal fibrils.** It has a high resistance to breaking under repeated flexing.

As the District Judge also found,*** and the Court of Appeals affirmed, the fibrillar or internally fibrous structure of Seckel's strip results automatically from his claimed process. If either component plastic (cellulose acetate or cellulose acetate butyrate) were extruded alone, the strip

---

* Although their names are similar, these are two distinctly different compounds (P. 155-6a, P. Ex. 24)

** "A bundle of fibrils make up a fiber". (Webster's New International Dictionary 2nd Edition, 1945)

*** "Any extrusion of cellulose acetate by itself or of cellulose acetate butyrate by itself always results in a product which is devoid of internal fibers; never, when extruded alone, is the mono-filar filament (non-fibrous) of cellulose acetate or of cellulose acetate butyrate inherently or internally fibrous. The patent discloses that when a mixture of cellulose acetate molding powder and cellulose acetate butyrate molding powder is plasticized and extruded through a single die orifice, the extruded strip automatically and inherently is internally fibrous." (Pet. App. B 25-56)

would be non-fibrous and brittle and easily broken; it would break on flexure like a strip of glass or a rod of ice (P. 80-1a, 132a). But the union of the same ingredients in the mixture of the invention in suit produces on extrusion an apparently homogeneous but actually fibrillar strip.

The superior longitudinal and bending strength of the strip of the invention in suit is due to its fibrillar structure. Petitioner's attorney stated at the trial:

> "it is better than cellulose acetate, as such, because cellulose acetate, as such, will not form such longitudinal fibers". (P. 28a)

Because of its strength, flexible and inherent fibrillar structure, the invention solved problems which had long plagued the industry of boning for corsets, brassieres and other foundation garments (P. 18-32a, 48a, 51-52a, 80-81a, 146-150a, 149-150a).

The invention, commercially called "Bonar" has virtually replaced all prior materials (P. 48a, 51a-55a).

Petitioners conceded the accomplishments of the invention (P. 146-150a); the District Court found it "useful" (Pet. App. C 29); and, the Court of Appeals found it "new and useful" and "worth-while" (Pet. App. B 19).

The admitted infringement is a copy of the most preferred form of the invention disclosed in the patent example (P. 5a, 113a).

Here is a patented invention which truly promotes the progress of science and the useful arts.

The petition presents no valid reason for allowance of the writ.

The *Graver* decision* relied on so heavily in the Petition is plainly inapposite. That decision was concerned with the two-court rule, wherein the lower courts made concurrent conclusions of invention on issues involving conflicting testimony and credibility. But even so, this Court noted expressly (336 U.S. 275)

> "* * * the ultimate question of patentability is one of meeting the requirements of the statute, R. S. 4886, as amended 35 U. S. C. 31 * * *."

If conflicting testimony and credibility questions are not present, it is well settled that Rule 52(a) does not apply to the trial court's conclusion of "invention" or "no invention" even under the two-court rule. This was made plain in this Court's most recent patent validity case,** where a concurrent holding of invention by the two lower courts was reversed:

> "The questions of general importance considered here are not contingent upon resolving conflicting testimony, for the facts are little in dispute."**

In the instant case, the two lower courts did not agree on the question of invention, there was no conflicting testimony on the evidence concerning the issue, and the decisions of both courts turned on documentary or undisputed facts.

---

* *Graver Tank & Mfg. Co.* v. *Linde Air Products*, 336 U. S. 271, 275 (1949); 339 U. S. 605 (1950)

** *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, 153 (1950)

a. No issue of evidentiary fact or credibility.

The bulk of the record and testimony of the witnesses was concerned with uncorroborated oral recollection of so-called "purging" and "contamination" trade practice. Both the District Court and the Court of Appeals refused to give it any weight.*

On the contrary, the opinions of both courts below show that their decisions turned solely upon the question of "invention" over the teachings of the prior art patent references. Only the two expert witnesses testified on this subject, and they agreed as to the evidentiary facts of those teachings. Both agreed that the prior patents did not disclose either the process or article of the patent in suit.

Petitioners' own expert witness summed up the matter as follows:

> "A. Well, I said before that none of these patents show the same method that Seckel used.
>
> Q. And by 'same method' can we say, for brevity, that none of the patents show taking two incompatible materials, mixing them thoroughly, squeezing them out through an extruder, in a single nozzle extruder, so that *the final product* is a material which *when flexed*, or worked, you can tell *consists of a vast number of filaments?*
>
> A. None of them are like the Seckel patent, no." (P. 210a-211a) (Emphasis supplied.)

The testimony of the experts on their hindsight evaluation of the invention, quoted copiously on pages 8-11 of the petition, shows remarkable agreement. It also fully supports the Court of Appeals' opinion.

* "It would be unjust to invalidate this patent on such flimsy evidence. In passing, we find no word of support for it in the opinion of the district judge." (Court of Appeals' opinion, Pet. App. B 17-18)

Of course, the two expert witnesses did disagree in their semi-legal *opinions* as to whether the patent met the legal standard of "invention". But this is true in every contested patent case, and was the ultimate question for judicial decision. It did not pose a question of credibility.

Note that the District Court's only reference to the testimony is that it was "aided by the expert testimony" (Pet. Appendix C, page 27). Such statement hardly shows a picking and choosing between experts because of credibility, but instead indicates the opposite.

b. The Court of Appeals accepted and relied upon the Trial Court's evidentiary findings and the expert testimony.

The appellate opinion includes a definition of the nature of the invention in almost the same language as the trial court finding and notes it is "without contradiction" (Pet. Appendix B, p. 15).

And, most important, the appellate opinion also accepts and discusses the trial court's fact findings on the prior art patents. Indeed, with respect to the main prior patent reference (Goessling), the Court of Appeals quotes the District Court finding verbatim. Compare petition appendix B, pages 16-17 with petition appendix C, pages 26-27.

Note that the District Court findings on the prior patent teachings are mere short hand renditions of language from the face of the prior patents themselves; and note also that the Court of Appeals' opinion adds only additional language from those patents and undisputed facts.

For example, after quoting from and accepting the District Court finding that the Goessling patent reference involved a process using injection *molding*, the Court of

Appeals pointed out (Pet. App. B 16) that the invention in suit was "impossible of achievement by the molding method" of Goessling* and that the flexible strips of the invention were not within the "contemplation of the Goessling objectives which called for a rigid, brittle, mica-like article, the exact opposite of the patent here."** (Pet. App. B 16)

But the trial court had concluded that the Goessling patent "anticipated" the invention in suit. So here the Court of Appeals simply pointed out that this conclusion was "impossible" and the "exact opposite" of the patent in suit. Petitioner's own expert witness (p. 7, *supra*) had admitted the Goessling patent did not anticipate.

The same situation prevails with respect to all of the other District Court findings on the prior art patents. As the findings show, none of the prior patents was concerned with a mixture of *two* plastic ingredients and none of them was concerned with *extrusion*.

The Court of Appeals accepted the findings and then summed them up, concluding:

> "All in all, the prior art revealed no hint of combining two incompatible plastics to form a solid mass of fixed fibrils" (Pet. App. B, p. 17).

And at the argument of the appeal, as the Court of Appeals pointed out, petitioners apparently agreed:

> "Indeed appellees' principal argument to us is not so much that the disputed method appears from the above

---

* It was uncontested that when Seckel's two plastic ingredients are *molded* together, they form a weak and brittle non-fibrillar product that fractures (D. Ex. 17, P. 182a, 185-6a, 192a). See also the testimony of petitioners' expert on Goessling's so-called "sprue" at P. 212-214a.

** See the Goessling patent, P. 225a, col. 2.

> listed prior art but that it derives directly from a procedure in the trade known as 'purging' ". (Pet. App. B, page 17)

The principle that the appellate court may properly consider documentary evidence or undisputed facts, as supplements to the fact findings made by the trial court where the trial court has made no findings on such evidence, is well established by many decisions in the different courts of appeal and has been approved by this Court. Such review by a court of appeals, in order to affirm or reverse the district court *conclusion* on the issue of invention, is especially frequent in patent cases and is a well settled uniform practice among the various circuits.

> "That is, if it appears from the face of the instruments that extrinsic evidence is not needed to explain terms of art, or to apply the descriptions to the subject-matter, so that the court is able from mere comparison to say what are the inventions described in each, and to affirm from such mere comparison that they are not the same, but different, then the question of identity is one of pure construction, and not of evidence and, consequently, is matter of law for the court, without any auxiliary matter of fact to be passed upon by a jury, if the action be a law." *Heald* v. *Rice*, 104 U. S. 737, 749, 26 L. Ed. 910, 914 (1882).
>
> See also *Merchants' Nat. Bank* v. *City of Richmond*, 256 U. S. 635, 638 (1921); *Himmel* v. *Serrick*, 122 F. 2d 740, 742-3 (7 Cir. 1941); *Hazeltine* v. *General Motors*, 170 F. 2d 6, 10 (6 Cir. 1948); *Munro* v. *Smith*, 259 Fed. 1, 2 (1 Cir. 1919); *Atlantic* v. *James B. Berry*, 106 F. 2d 644, 645 (3 Cir. 1937); *Sales Affiliates* v. *National Mineral Co.*, 172 F. 2d 608, 613 (7 Cir. 1949)."

Conclusion

The petition for a writ of certiorari fails to show any reason why this Court should review the carefully considered unanimous decision of the Court of Appeals below.

The petition is without merit and should be denied.

Respectfully submitted,

GEORGE B. FINNEGAN, JR.
Attorney for Richard A. Fisch and Anchor Plastics Co., Inc., Respondents

JEROME G. LEE (New York, New York)
Of Counsel

December 6, 1957